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No. 86-113

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

AMERICAN BAPTIST CHURCHES IN THE U.S.A., *et al.*,
Petitioners,

v.

RONALD W. REAGAN, as President of the
United States of America, *et al.*,
Respondents.

Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Third Circuit

BRIEF OF COUNCIL ON RELIGIOUS FREEDOM AS *AMICUS CURIAE* IN SUPPORT OF THE PETITIONERS

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INTEREST OF THE *AMICUS CURIAE*

The Council on Religious Freedom is a nonprofit corporation formed to uphold and promote the principles of religious liberty. The objectives of the organization include taking action to eliminate religious discrimination and to uphold traditional concepts of church-state separation.

The Board of Directors of the Council on Religious Freedom is composed of individuals who are active in religious affairs and who promote the concept of free exercise of religion and the concept that government should not respect any establishment of religion.

SUMMARY OF ARGUMENT

The Papal Representative to the United States clearly has stated that the Holy See is a religious, not political, entity. The lower courts in this case, however, have declared the United States Government can disregard both the Holy See's characterization of itself and this Court's traditional holdings that the Religion Clauses of the First Amendment require Government neutrality when dealing with churches. To conclude that the President stands above the demands of the Establishment Clause and that aggrieved denominations have no standing to press their First Amendment rights is to repudiate in effect a key principle of our Constitution.

ARGUMENT

THE PRESIDENT'S ARTICLE II POWERS SHOULD NOT BE ABOVE JUDICIAL REVIEW WHEN THEY ALLEGEDLY VIOLATE THE ESTABLISHMENT CLAUSE OF THE FIRST AMENDMENT

The Council on Religious Freedom vigorously opposes the decisions of the lower federal courts in this case that the President's conduct of foreign policy transcends values embodied in the Bill of Rights and that religious denominations and clergy have no standing to challenge diplomatic recognition by the United States government of a religious denomination.

The evidence is this case about the nature of the Holy See is beyond question. The representative of the Holy

See itself has set the record straight. Archbishop Pio Laghi, Apostolic Pro-Nuncio in the United States, made the following points in his address at The Catholic University of America on April 6, 1984, where he was awarded an honorary degree "as the Pope's personal representative":

> Papal Diplomacy has been referred to as *sui generis*, because nowhere is it exactly paralleled. In fact, the Catholic Church is the only religious body that I know of that engages in direct relations with various states. You recall the confusion and controversy that arose in the media at the time it was announced that the United States and the Holy See intended to re-establish diplomatic ties. Some mistakenly tried to justify the American government's action by implying that it was entering into a diplomatic relationship not with the Roman Catholic Church as such, the Holy See, but rather with the sovereign Vatican City-State.

Petitioner's Appendix at 72a (hereinafter called Appendix).

The Apostolic Pro-Nuncio continued by noting that "the Pope's religious authority . . . confers upon him the classical right of legation, a diplomatic standing in the world. Those who interpret Papal Diplomacy as emanating from the Pope's temporal sovereignty are failing to understand the true nature of the mission of the Holy See." *Ibid.*

The Apostolic Pro-Nuncia then quoted Monsignor Montini's discourse entitled, "Papal Diplomacy As a Means of Representing Christ Before the World": "'You must all know what it means to be representatives. Diplomacy means representation. Let us know what it means to represent Christ, and to represent the Church." Appendix at 73a. Monsignor Montini, of course, later became Pope Paul VI.

The Apostolic Pro-Nuncio also quoted the late Archbishop Cardinale, former Papal Representative to Belgium, for the proposition that the Holy See entrusts its diplomatic representatives with a mission that is "at once religious, political and social." *Id.*, at 75a.

The Apostolic Pro-Nuncio explained why Papal Representatives are not called ambassadors: "Unlike representatives from other nations of the world, the Holy See prefers to use the term, *Nuncio*, which derives from the Latin *nuntius*. We exercise the role of messengers, heralds of the Good News. . . ." *Id.* When capitalized, "Good News," of course, is a traditional Christian phrase referring to preaching the Biblical concept that Jesus is Lord of all:

> But how are men to call upon him in whom they have not believed? And how are they to believe in him of whom they have never heard? And how are they to hear without a preacher? And how can men preach unless they are sent? As it is written, "How beautiful are the feet of those who preach good news!"

Romans 10:14-15 (Revised Standard Version).

The Apostolic Pro-Nuncio also quoted Pope Paul VI on the role of modern Papal Representatives:

> Today, the Nuncio must place a more pronounced pastoral accent on his work. He too is at the service of the Kingdom of God as it goes forward in the land. . . . You, the Representatives of the Pope, must be for the local hierarchies a living sign of collegiality, sharing as far as you can their pastoral preoccupations. Coming from the heart of Christianity, you are the witnesses of the catholicity, that is, the universality of the Christian message. Sharing as you do in the special charism of Peter, you represent in a privileged way the demands of unity in the desired diversity of expressions of the same face.

Appendix at 76a. The Apostolic Pro-Nuncio affirmed that his experience overwhelmingly involves pastoral work, not diplomacy: "As a matter of fact, I can tell you that the reality shapes up precisely that way. I spend most of my time dealing with issues that are distinctly religious in nature, and only a small portion of my day is taken up by matters that pertain to my diplomatic position with the United States Government." *Ibid.*

The Apostolic Pro-Nuncio concluded by saying that the "Holy See believes that it finds itself in a unique position of spiritual and moral authority in the service of peace for all." *Id.*, at 78a. He thanked The Catholic University for the honorary degree, accepting it not as recognition of his personal accomplishments "but of the achievements of the Holy See and of the Vicar of Christ himself." *Id.* at 78a-79a.

In summary, the Apostolic Pro-Nuncio has proclaimed that diplomatic recognition of the Holy See is recognition of the Roman Catholic Church as such as not of some European mini-state called the Vatican City. It's the Pope's religious and spiritual authority that confers on him the right of legation. Any other concept fails to understand the true mission of the Holy See. And Papal Representatives are representatives of Christ, nuncios, bearers of the Good News, Christian pastors who have embarked on missions that are "at once" religious, political, and social.

Even though the Apostolic Pro-Nuncio has clearly defined the role of the Holy See as religious and its representatives messengers of Christ, the District Court in this case has declared the Holy See's view as really not important. Concluded the District Court:

> Every one of plaintiffs' contentions in this litigation is based upon the premise that "the Vatican" or the

> "Holy See," with which the exchange of ambassadors has occurred, is essentially a church rather than a state, or, at least, that it is a church-state whose churchly attributes far outweigh its secular attributes. The record provides considerable support for the proposition that the Vatican/Holy See views itself in that light. But this does not mean, of course, that the government of the United States is obliged to regard the Vatican/Holy See as primarily a church rather than a state. Whatever the correct analysis, the authority to conduct it rests with the Executive Branch, not this court.

Id, at 27a.

In the view of the Council on Religious Freedom, the District Court in one short paragraph chose to ignore the facts as clearly explained by the Papal Representative to the United States and declared that in matters of foreign relations the Executive Branch is above the demands of the Bill of Rights and that the Court of Appeals erred in affirming the District Court's decision. To conclude that the President stands above the demands of the Establishment Clause of the First Amendment to the Constitution and that aggrieved denominations and their clergy have no standing to press their First Amendment rights is in effect to repudiate a key principle of our Constitution and our republican form of government.

This Court has insisted—and rightly so—that government must be evenhanded in its dealing with churches.

In *Everson* v. *Board of Education*, 330 U.S. 1, 18 (1947), this Court said government must "be neutral in its relations" with churches.

In *Zorach* v. *Clauson*, 343 U.S. 306, 314 (1952), this Court proclaimed "government must be neutral when it comes to competition between sects."

In *Epperson* v. *Arkansas*, 393 U.S. 97, 104 (1968), this Court said, "The First Amendment mandates governmental neutrality between religion and religion."

In *Gillette* v. *United States*, 401 U.S. 437, 449-450 (1971), this Court added, "An attack founded on disparate treatment of 'religious' claims invokes what is perhaps the central purpose of the Establishment Clause—the purpose of ensuring governmental neutrality in matters of religion. . . ."

In *Larson* v. *Valente*, 456 U.S. 228, 244-245 (1982), this Court said, "The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another. . . . This constitutional prohibition of denominational preferences is inextricably connected with the continuing vitality of the Free Exercise Clause."

By diplomatically recognizing the Holy See, the Executive Branch of the United States Government has officially preferred one religion over another. Diplomatic recognition permits the favored church to extend its influence and power from a status that no other church has or, apparently, can ever expect to have. This special acknowledgment of one church thus puts it on a vantage ground no other church can match. This is precisely the kind of unequal treatment the Establishment Clause of the First Amendment, as this Court has so often indicated, was designed to prevent.

CONCLUSION

For the reasons stated above, the Council on Religious Freedom urges this Court to help conserve religious freedom by granting the Petition for Writ of Certiorari in this case. Otherwise an Establishment Clause concept will

have been rewritten in these words: "The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another—except when the Executive Branch deals with political questions involving foreign policy."

Respectfully submitted this 22nd day of August, 1986.

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